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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 731

PHILLIP GIANOPULOS,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF COOK COUNTY, COOK COUNTY, ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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DECISION BELOW

On October 10, 1963, the Honorable Alexander J. Napoli, Chief Justice of the Criminal Court of Cook County, sustained a motion to dismiss and entered an order, not reported, denying an application for a writ of *habeas corpus* entitled: "The People of the State of Illinois ex rel. Phillip Gianopulos, Petitioner *vs.* Frank Pate, Warden, Illinois State Penitentiary, Joliet, Illinois, Respondent, No. 43980."

JURISDICTION

The order of the Criminal Court of Cook County, rendered under the Illinois Habeas Corpus Act, is a final decision of the State court of last resort.

Although federal questions were raised by the petitioner in the trial court, the decision of the trial judge was not an adjudication of the petitioner's constitutional rights. As a matter of State law and local procedure, *habeas corpus* is not available in Illinois to test the actions of the Illinois Pardon and Parole Board.

STATUTES INVOLVED

Illinois Revised Statutes; 1961, Chapter 65, § 22-2 (Illinois Habeas Corpus Act):

> § 22. If it appears that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for one of the following causes:
>
> 2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge.

Illinois Revised Statutes, 1964, Chapter 38, §§ 801-810 (Illinois Sentence and Parole Act).

QUESTIONS PRESENTED

Whether or not the petitioner was entitled to a full hearing on an application for a writ of *habeas corpus*, charging an improper revocation of parole by the Illinois Pardon and Parole Board?

Whether the trial court would be authorized to enter an order of discharge under the Illinois Habeas Corpus Act, where an admittedly valid sentence had not expired?

Whether the members of the Illinois Pardon and Parole Board were properly before the trial court, in an action directed against Frank Pate, Warden Illinois State Penitentiary, Joliet Illinois?

Whether the unsupported allegation of the petitioner, that he was not afforded a hearing before the Illinois Pardon and Parole Board should prevail over an express communication of the Board, indicating that a hearing was held?

Whether if a hearing were held and State law relied upon in the dismissal of the petitioner's application, an important federal question is presented for the determination of this Honorable Court?

STATEMENT OF PROCEEDINGS BELOW.

On October 6, 1960, Phillip Gianopulos was found guilty of burglary by the Criminal Court of Cook County and sentenced to a term of one to ten years in the Illinois State Penitentiary. On November 6, 1961, he was released on parole. A parole violation warrant was subsequently issued against him, and Gianopulos was returned to the Illinois State Penitentiary on June 13, 1962.

Gianopulos was heard on the question of his parole violation and on September 19, 1962, the Board found that he was not a violator. This order was revoked on October 17, 1962 and Gianopulos declared a violator on January 16, 1963 (Petitioner's Brief, Appendix 2).

Thereupon, the petitioner filed an application for writ of *habeas corpus* in the Criminal Court of Cook County, which was dismissed upon motion of the respondent.

ARGUMENT.

I.

NO IMPORTANT FEDERAL QUESTION IS INVOLVED.

Petitioner alleges that he was found in violation of parole without a hearing and contrary to due process of law. This unsupported allegation is directly opposed by an official communication from the Pardon and Parole Board, directed to petitioner's counsel (Petitioner's Brief, Appendix 2). Clearly, this document revealed that Gianopulos was heard on the question of parole violation in accordance with the provisions of the Illinois Parole Act and the Rules and Regulations of the Pardon and Parole Board.

Illinois has consistently held that *habeas corpus* is not available under the circumstances of the case at bar. In *People ex rel Castle* v. *Spivey*, 10 Ill. 2d 586, 141 N. E. 2d 321 (1957), the Illinois Supreme Court specifically decided that the writ of *habeas corpus* cannot be used to review a decision of the Pardon and Parole Board. In this case, mandamus was awarded against a trial judge, who on writ of *habeas corpus* discharged a prisoner before full service of a lawful sentence. The Pardon and Parole Board, for an undisclosed reason, had previously refused to grant parole. Accord: *People* v. *Dixon*, 387 Ill. 420, 427, 56 N. E. 2d 816 (1944); *People* v. *Crowe*, 387 Ill. 53, 55 N. E. 2d 84 (1944).

Federal Courts of Appeal have similarly limited *habeas corpus*. In *Howell* v. *Haitt*, 199 F. 2d 584 (5th Cir. 1952), a prisoner held in a federal penitentiary pursuant to revocation of parole was not permitted to obtain review of the Board's decision in a *habeas corpus* proceeding. A

motion to dismiss was sustained by the trial court and the order affirmed on review. The prisoner was held in violation of parole after a trial for armed robbery and a finding of not guilty. Cf. *Fox* v. *Sanford*, 123 F. 2d 334, 335 (5th Cir., 1941).

In *United States* v. *Nicholson*, 78 F. 2d 468, 471 (4th Cir., 1935), certiorari denied, 296 U. S. 573, a contention that the petitioner was not given a proper hearing by a parole board was held not a question within the scope of *habeas corpus*. Mandamus was suggested as a proper remedy.

No federal constitutional question is present in the administration of the Illinois Parole Act. *Haines* v. *Castle*, 226 F. 2d 591 (7th Cir., 1955), certiorari denied 350 U. S. 1014. The parole law of Illinois is administered by an executive branch of the government. In the absence of clear and convincing evidence to the contrary, a court must assume that the Pardon and Parole Board has properly discharged its official duties. *United States ex rel Harris* v. *Ragen*, 177 F. 2d 303 (7th Cir., 1949).

In this case, the Criminal Court of Cook County has not made an adjudication relative to the defendant's constitutional rights. As a matter of local procedure and State law, *habeas corpus* is not available in Illinois to challenge a decision of the Pardon and Parole Board. Therefore, no federal question is involved in the dismissal of the application for a writ of *habeas corpus*. *Loftus* v. *Illinois*, 334 U. S. 804.

II.

A FULL HABEAS CORPUS HEARING WAS NOT WARRANTED.

The power of Illinois courts to grant a discharge under *habeas corpus* is expressly limited by statute. Illinois Revised Statutes, 1961, Chapter 65, section 22. As long as a valid sentence had not expired, a prisoner is not illegally detained, and *habeas corpus* is not available. *Howell* v. *Haitt*, 199 F. 2d 584 (5th Cir., 1952).

The respondent's motion to dismiss emphasized the court's lack of jurisdiction on *habeas corpus*. Briefs were submitted in support of each position and after a careful consideration of the written argument, the trial judge dismissed the application. No request for oral argument was made by petitioner's counsel. To the contrary, he expressed satisfaction with the trial judge's consideration of his application and Brief in support thereof (Petitioner's Brief, Appendix 9). Under these circumstances, the petitioner was granted procedural due process.

III.

PROPER PARTIES WERE NOT BEFORE THE TRIAL COURT.

Petitioner's application for a writ of *habeas corpus* was directed against Frank Pate, Warden of the Illinois State Penitentiary. The Warden is not a member of the Illinois Pardon and Parole Board. Illinois Revised Statutes, 1961, Chap. 127, sec. 5.11. Although an attempt has been made to obtain a review of the Pardon and Parole Board's decision, no member of the Board was made a party to the writ. *Howell* v. *Haitt*, 199 F. 2d 584, 585 (5th Cir., 1952). Failure to join proper parties was, in itself a sufficient basis for the dismissal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari be denied.

Respectfully submitted,

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